

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE LAMBERT, Personal Representative of
the Estates of JUSTIN PIERCE and ROY PIERCE,
Deceased,

UNPUBLISHED
March 6, 1998

Plaintiff-Appellant,

v

No. 198244
Wayne Circuit Court
LC No. 94-424407-NO

MIMI SIRANO,

Defendant,

and

MICHIGAN CONSOLIDATED GAS COMPANY,

Defendant-Appellee.

Before: Michael J. Kelly, P.J., and Cavanagh and N. J. Lambros*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Michigan Consolidated Gas Company (hereinafter "MichCon") summary disposition in this wrongful death action. We reverse.

Two of Michelle Lambert's children died in a fire that occurred on December 7, 1992 in a house owned by Mimi Sirano¹ and leased to Melinda Deal. At the time of the fire, plaintiff, her boyfriend and her children were living with Deal. Plaintiff's theory of the case is that a defective gas space heater in the living room caused the fire. MichCon does not dispute that the heater was defective.

According to plaintiff's theory, MichCon's liability for the fire is due to the acts and omissions of its employee, Rodney Lee, when he executed a turn-on gas order at the house on September 24, 1992. Deal and her boyfriend were present at the time. Deal testified that Lee told her that he cleaned the

* Circuit judge, sitting on the Court of Appeals by assignment.

pilot of the space heater in the living room but could not light it. He told her it was “too old for him to turn on,” and that she “would have to have someone else turn it on.” Lee also pushed an exhaust pipe that was out of the wall up against the wall. Deal’s boyfriend, Lee Mitchell testified that he saw Lee blow on the pilot and heard him tell Deal that it was bad, it needed repairs, and “that if you choose, to have somebody come out and light it, that he was not going to light it.” The deposition testimony of Lee included in the lower court record does not contradict these accounts.

Deal testified that she called Sirano and told her that MichCon could not turn on the space heater in the living room and that “the guy told me that I would have to have someone else light it.” At Sirano’s request, the space heater was lit around October 1, 1992 by a man Sirano employed frequently as a handyman.

Plaintiff alleged that MichCon was negligent because, among other reasons, its employee, in violation of company policy, failed to issue a warning concerning the dangers presented by the space heater, failed to “red-tag” the heater, and failed to shut off gas to the heater or remedy the condition, despite actual or constructive knowledge of the condition. To support her allegations, plaintiff presented a copy of the “MichCon Service Standards,” which discusses the appropriate actions an employee should take upon discovering a defective appliance.

MichCon moved for summary disposition arguing that the court should decide as a matter of law that MichCon’s conduct was not a proximate cause of the deaths of plaintiff’s decedents. The trial judge agreed, noting that a reasonable juror could not find true the testimony that indicated Lee directed the lighting of the pilot to the defective equipment.

Although the trial court was apparently skeptical that Lee told Deal to have someone else light the pilot, the court was not permitted to assess credibility or determine facts in deciding a motion for summary disposition. *Skinner v Square D*, 445 Mich 153, 161; 516 NW2d 475 (1994). We will consider Deal’s and Mitchell’s testimony on this matter in the light most favorable to plaintiff.

Proximate cause, as explained in *Skinner, supra*, requires proof of both cause in fact and legal cause, which is also called proximate cause.

The cause in fact element generally requires showing that “but for” the defendant’s actions, the plaintiff’s injury would not have occurred. On the other hand, legal cause or “proximate cause” normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. [*Skinner*, 445 Mich at 163. (Citations omitted.)]

Generally, the issue of proximate cause is resolved by the trier of fact, unless reasonable minds could not differ, in which case the court should determine the issue as a matter of law. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

We conclude that reasonable minds could differ regarding whether Lee's actions were a cause in fact of the fire and resulting deaths. Evidence presented by plaintiff supports the view that the fire was caused by the living room space heater. Reasonable minds could conclude that if Lee had disconnected the gas supply to the heater or issued the appropriate warnings, the fire would not have occurred.

We also conclude that reasonable minds could determine that Lee's actions were a legal cause of the deaths.

To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct "may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable." [*Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997), quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).]

Reasonable minds could conclude that it was foreseeable that allowing the defective space heater to remain connected to the gas supply without warning of the dangers presented "may create a risk of harm to the victim" and that it was foreseeable that the occupants of the house would have the pilot to the space heater lit, that they would operate the appliance, and that a fire would ultimately result.

Although MichCon claims that "unsupervised children playing in the vicinity of the defective heater" was an intervening cause, MichCon has presented no evidence to take that possibility beyond the level of mere speculation. Nor are we persuaded that, as a matter of law, the absence of smoke detectors is an intervening, superseding cause.

Both parties address the issue of duty in their appellate briefs. However, this issue was not raised before or decided by the trial court, and we decline to address it.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

¹ The parties stipulated to the dismissal of the action against Sirano.